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In The

Supreme Court of the United States

October Term, 1974

No. 74-1592

ARTHUR F. TURCO, JR.,

Petitioner,

vs.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The unreported opinions of the New York State Appellate Division of the Supreme Court, Fourth Department, dated December 17, 1973 and January 28, 1975 appear in petitioner's appendix (7a-35a). The unreported order of the New York Court of Appeals dated February 19, 1975, denying petitioner's motion for leave to appeal and dismissing the appeal taken as of right "upon the ground that no substantial constitutional question is directly involved," also appears in petitioner's appendix (36a).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether there is a rational basis for New York's procedure for disciplinary action against New York attorneys whereby the proceeding is initiated before the Appellate Division of the Supreme Court and appeals to the Court of Appeals are available (a) as of right where one or more of the five justices of the Appellate Division dissents from the decision of the court; (b) as of right where the appeal presents a question under the Constitution of the State or of the United States; and (c) by leave of either the Court of Appeals or the Appellate Division.

2. Whether the New York Appellate Division may adjudge a lawyer guilty of professional misconduct upon the basis of a conviction on a plea of guilty to the misdemeanor of common law assault in Baltimore, Maryland and a conviction on a plea of guilty to the misdemeanor of possessing a dangerous weapon in New York City, holding such convictions to be binding and conclusive, in spite of an assertion of innocence at the time of one of the two pleas.

3. Whether petitioner's rights under the Due Process clause were violated where the proceedings against him were initiated by a written petition, and he was afforded the opportunity to submit a written answer and present oral and written arguments prior to any adjudication of professional misconduct, the opportunity to present testimony at a mitigation hearing, the opportunity to review and respond to the written report by the justice presiding at the mitigation hearing and the opportunity to present written briefs and make oral arguments before the determination of any discipline.

Constitutional and Statutory Provisions Involved

Article 6, Section 3 of the New York State Constitution is set forth in petitioner's appendix at 2a — 5a; Section 90, paragraphs 2 and 8 of the New York Judiciary Law are set forth in petitioner's appendix at 6a. Paragraphs 1(a), 3, 6 of Section 90 are set forth in respondent's appendix at B-1 — B-2. Section 1022.9 of the New York Code of Rules and Regulations (Rules promulgated by the Supreme Court, Appellate Division, Fourth Department) is set forth in respondent's appendix at B-2 — B-3. Sections 5601, 5602, 5612 of the New York Civil Practice Laws and Rules are set forth in respondent's appendix at B-4 — B-7.

Statement of the Case

Petitioner, Arthur F. Turco, Jr., an attorney admitted to practice in New York State on December 21, 1967, was disbarred and removed from the roll of New York attorneys by order of the New York State Supreme Court, Appellate Division, Fourth Department, dated January 28, 1975. During the course of the disciplinary proceedings, begun by written petition dated May 8, 1973, petitioner was afforded several opportunities to present oral and written arguments to the Appellate Division and to present testimony and other evidence in mitigation of the matters charged in the petition against him. After consideration of the undisputed allegations in the petition, the evidence offered in mitigation at the hearing afforded to petitioner, and the oral and written presentations of counsel, the Appellate Division, exercising its discretion as to the appropriate sanction under the circumstances, entered its order of disbarment.

The disciplinary proceedings were set in motion on April 4, 1972 when the Appellate Division ordered the Monroe County Bar Association to conduct a preliminary investigation of the professional conduct of petitioner and, if warranted by its in-

vestigation, prepare, serve and file charges. (Complaint, Attachment A.)* On May 8, 1973 the Bar Association served a written complaint setting forth specific charges and requesting the Appellate Division to "make such order with respect to [Turco's] license to practice as an attorney and counselor-at-law as it deems proper and to take such other and further proceedings as to the Court may seem just and proper." The allegations central to the complaint were as follows:

> 5. On or about May 1, 1970, respondent, together with certain other individuals, was indicted in Baltimore, Maryland, in connection with the slaying of one Eugene Leroy Anderson on July 12, 1969. Specifically, respondent was charged with conspiracy to commit murder (indictment 2313), assault with intent to murder (indictment 2314, first count), common law assault (indictment 2314, second count), soliciting to commit a felony [murder] (indictment 2315), and soliciting to commit a felony [kidnapping] (indictment 2316). The aforesaid indictments are attached hereto as Exhibits "B", "C", "D", and "E" respectively.

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* The petition of the Bar Association will be referred to as the "complaint"; the petition for a writ of certiorari will be referred to as the "petition." Respondent has requested the Clerk of the Appellate Division to transmit the following parts of the record, which will be referred to by the designations below:

Petition of the Bar Association	"Complaint"
Answer of Arthur F. Turco, Jr.	"Answer"
Transcripts of testimony at the hearings in mitigation	
Volume 1 March 28, 29, 1974	"T1"
Volume 2 April 4, 5; May 2, 3, 1974	"T2"
Volume 3 May 21, 1974	"T3"
Report of hearings in mitigation by Justice Lyman H. Smith	"Report"
Exhibit C at the mitigation hearings consisting of the decision of the Court of Special Appeals of Maryland	"Exhibit C"

> 6. On February 14, 1972 respondent entered a plea of guilty to the second count of indictment 2314, common law assault, in satisfaction of all pending charges. The transcript of proceedings on February 14, 1972 in the Criminal Court of Baltimore is attached hereto as Exhibit "F".
>
> 7. Respondent was sentenced to a term of five years in the custody of the Department of Correction but such sentence was suspended (Exhibit "F", p. 47).
>
> 8. Respondent filed an appeal to the Court of Special Appeals of Maryland in proper person. The Appeal was argued orally on March 2, 1973. No decision has yet been rendered.*
>
> * * *
>
> 10. On February 22, 1970 respondent was arrested in New York City and charged with possession of weapons, possession of dangerous drugs, possession of hypo instrument and obstructing Government administration. A report of such arrest by the New York City Police Department is attached hereto as Exhibit "H".
>
> 11. On March 8, 1974 respondent entered a plea of guilty to a violation of section 265.05 of the Penal Law (no specified subdivision) as a misdemeanor and on April 3, 1972 was conditionally discharged. The transcript of record of the Criminal Court of the City of New York is attached hereto as Exhibit "I".
>
> 12. A certified copy of the court record in the Criminal Court of the City of New York and the affidavit in support of the charges against respondent are attached hereto as Exhibit "J". The Decision of Justice Jack Rosenberg denying a motion to suppress certain evidence and certain admissions is attached hereto as Exhibit "K". The stenographic minutes of proceedings on March 8, 1972 when

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*The judgment of conviction was affirmed on June 13, 1973. See Exhibit C.

respondent entered a plea of guilty of unlawful possession of a weapon in violation of section 265.05 is attached as Exhibit "L".

13. Respondent appealed his conviction to the Appellate Term, First Department, which unanimously affirmed said conviction without opinion on December 19, 1972.

14. By reason of the foregoing, petitioner submits that respondent is or may be guilty of professional misconduct, crime, misdemeanor or felony.

On June 21, 1973 Mr. Turco filed a 61-page answer (with lengthy attachments) which, without denying any of the allegations in the petition, reviewed his personal history, his involvement with the defense of various Black Panther cases, his weapons arrest in New York City, his trip to Canada, his first trial on the charges related to Eugene Anderson, and his reasons for his pleas in New York City and Baltimore. Mr. Turco concluded his answer with the request that a hearing be conducted before a judicial officer and that he be allowed to assert his innocence of the charges to which he pled guilty in Baltimore and New York.

On December 17, 1973, after the submission of written briefs and the presentation of oral arguments by counsel, the Appellate Division denied Mr. Turco's request to dismiss the charges or to require the relitigation *ab initio* of the charges in Baltimore and New York City to which Mr. Turco had entered guilty pleas. The Court dismissed Mr. Turco's arguments as follows:

> "Although respondent suggests that his pleas were reluctantly made and were similar to pleas *nolo contendere* and hence of no effect in another proceeding (see *Matter of Kimball*, 33 N.Y. 2d 5) the plea of *nolo contendere* has been abolished in New York (*Ando v. Woodberry*, 8 N.Y. 2d 165, 170), and the records of respondent's pleas now show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence

> 'which was unavailable to him' at the time of those pleas (see *Matter of Keogh*, 17 N.Y. 2d 479, 481), we deem the two convictions to be final and binding upon him."

Based upon the undisputed fact of the two convictions, the Court found that "these acts of which respondent stands convicted constituted professional misconduct" and "illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law." The Court further held that Turco should be disciplined for such misconduct and afforded him a hearing "in mitigation of the discipline to be adjudged." (See 22 NYCRR § 1022.9(c); B-3.)

Hearings in mitigation were conducted before Justice Smith on March 28 and 29, April 4 and 5, and May 2, 3 and 21, 1974. Over eight hundred pages of testimony were taken. Justice Smith submitted a report to the Appellate Division dated October 25, 1974 without recommendation. Mr. Turco presented, in addition to evidence with respect to his character and ability as an attorney, testimony as to his asserted innocence of the charges which were the basis for his convictions in Maryland and New York City.

After receiving Mr. Turco's extensive brief and conducting oral argument in Chambers, the Appellate division issued an opinion dated January 28, 1975 finding that Mr. Turco should be disbarred. The opinion of the Appellate Division sets forth in detail the factual basis for Mr. Turco's disbarment and the facts will not further be repeated herein (See Petitioner's appendix, pp. 13a-35a).

Mr. Turco thereafter both served a notice of appeal to the Court of Appeals and also moved in the Court of Appeals for an order granting leave to appeal. By order dated February 19, 1975 the Court of Appeals denied Mr. Turco's motion for leave to appeal and, upon the Court's own motion, dismissed the appeal taken as of right "upon the ground that no substantial constitutional question is directly involved." (Petitioner's appendix, p. 36a)

ARGUMENT

POINT I

The questions presented by petitioner are plainly insubstantial.

A. ***New York's procedures for appellate review of disciplinary action against attorneys do not violate the due process or equal protection guarantees.***

There is no merit in petitioner's argument that an attorney is arbitrarily and capriciously denied the right of appeal from disciplinary action ordered by the Appellate Division. An attorney subject to disciplinary action may appeal to the Court of Appeals in exactly those situations in which other litigants may appeal from an order of the Appellate Division entered in a proceeding initially commenced before that Court: (a) where there is a dissenting vote among the five justices of the Appellate Division; (b) where leave to appeal is granted either by the Appellate Division or by the Court of Appeals; or (c) where the appeal presents a question under the constitution of New York or the United States. New York State Constitution, Article 6, Section 3 (McKinneys 1969); N.Y. Judiciary Law §90 (subd. 8) (McKinneys 1968); N.Y. CPLR 5601, 5602 (McKinneys 1974-1975 Supp); E.g., *Matter of Zuckerman*, 20 N.Y. 2d 430, 285 N.Y.S. 2d 1, 231 N.E. 2d 718 (1967); *Matter of Barash*, 19 N.Y. 2d 833, 280 N.Y.S.2d 398, 227 N.E. 2d 313 (1967); *Matter of Mathot*, 222 N.Y. 8, 117 N.E. 948 (1917); See, *Javits v. Stevens*, 382 F. Supp. 131, 141-142 (S.D. N.Y. 1974).

The legislative determination to vest the Appellate Divisions of New York's four judicial departments with authority for the admission and the removal of attorneys is clearly a reasonable and legitimate procedure for fulfilling New York's obligation to regulate the professional standards of attorneys practicing

before its courts. That the courts are the appropriate bodies to perform this function is not subject to serious debate. Nor can there be a serious challenge to the legislative basis for vesting the administration of such procedure in the four intermediate courts as opposed to the numerous courts of original jurisdiction, an administrative agency, or the highest appellate court. Although the consequence of vesting these matters with New York's intermediate courts, and attaching the same right of appeal to its highest court as that available in other instances, is that attorneys do not have a "review" in the Appellate Division, they have the unusual opportunity of an initial decision on the law and facts by five appellate justices. Thus, it is clear both that New York provides ample channels for review in the Court of Appeals and that New York's procedure bears a reasonable relationship to the permissible legislative goal of adopting a fair and workable system for regulating the professional standards of attorneys.

Although New York provides a procedure for disciplinary action against attorneys that differs in some of its procedural incidents from the procedure for disciplinary action against other professionals and from the procedure for criminal defendants and civil litigants, it is not the case that the legislative classification lacks appropriate justification. Different procedures may of course be provided for different classes of people. *Semler v. Board of Dental Examiners*, 294 U.S. 608 (1935); *Pordum v. Board of Regents*, 491 F.2d 1281 (2d Cir. 1974).

Arguments closely similar to those raised in the petition were shortly disposed of in *Javits v. Stevens*, 382 F. Supp. 131 (S.D. N.Y. 1974). In *Javits*, as here, the argument was made that New York's procedures for disciplinary action against attorneys violate the due process or equal protection clauses. The district court found that due process "has never been held to require that a state provide appellate courts or a right to appellate

review" (382 F. Supp. at 140) and held, moreover, that New York's review procedure for its disciplinary proceedings is consonant with due process. (382 F. Supp. at 140.) The district court also found the equal protection claims presented here to be without merit. The reasoning in *Javits* plainly shows the lack of merit in petitioner's present contention.

B. ***New York's procedure permitting petitioner a hearing on mitigation, but not an opportunity to relitigate his criminal convictions, fully complies with due process.***

There is no validity to the argument that New York may not, as a matter of substantive state law, hold that evidence of conviction of a crime stands as proof of the commission of the underlying criminal act. See *Matter of Levy v. Assoc. of the Bar of the City of New York*, ——N.Y.2d—— (7-10-75). As petitioner concedes, New York's rule comports with the "general direction of the law . . ." (Petition, p. 26.)

Petitioner is simply mistaken in his reading of *North Carolina v. Alford*, 400 U.S. 25 (1970). This Court in *Alford* held that a state may accept a defendant's plea of guilty to a reduced charge, in spite of a protestation of innocence, if the "defendant intelligently concludes that his interests require entry of a guilty plea and the record before the Judge contains strong evidence of actual guilt." (400 U.S. at 37.) Although the question of collateral consequences of the conviction was not raised in *Alford*, nothing intimated there forbids New York from attaching evidentiary weight to the conviction where, as here, the pleas were intelligently made and the records contained strong evidence of guilt.

Petitioner cannot contend that he was misled or entrapped regarding the collateral consequences of his plea to criminal charges. The prosecuting attorney in the Maryland proceedings stated that one of the considerations for accepting petitioner's plea to a reduced charge was ". . . [that] by pleading guilty to

assault Mr. Turco is exposing himself to the sanction by the Bar Association of the State of New York and will be subject to disbarment procedures in that State." (Complaint, Attachment F, p. 6.) Similarly, in the New York proceedings, where petitioner did assert his innocence when making his plea, the prosecutor made the following statement in recommending sentence:

> Mr. Corriero: Your honor, I believe, is aware that defendant is an attorney and an officer of the Court and admitted to practice in the State of New York. I believe, under the circumstances, that the charges against the defendant are extremely serious, and that the Court should consider this in imposing sentence on this defendant. (Complaint, Attachment 2, p. 5.)

Petitioner was given ample opportunity to be heard on whether his convictions evidenced moral turpitude and on the appropriate degree of discipline. Written charges were made and sustained, after briefs and oral argument, when petitioner's pleading presented no factual issues on the charges made in the complaint. Petitioner exercised his right to a hearing on issues in mitigation and, after receiving the written report of the justice who conducted the hearing, presented oral and written arguments to the Appellate Division on the appropriate discipline. Accordingly, petitioner had notice and an opportunity to be heard before collateral consequences were attached to his two convictions.

Fundamental fairness does not require more. Petitioner waived his opportunity to litigate his guilt or innocence with all the procedural safeguards attached to a criminal trial. His pleas were supported by strong evidence of actual guilt. He does not claim that he has evidence which was unavailable to him at the time of his pleas. *cf. Matter of Keogh*, 17 N.Y. 2d at 481. His present justifications for his pleas have been weighed against other circumstances revealed by the transcripts of the proceedings when the pleas were entered. For all of these reasons, his due process arguments are specious.

C. ***Petitioner had adequate notice and opportunity to be heard as to both the charges of professional misconduct and the matters in mitigation.***

As previously indicated, petitioner was afforded various opportunities to be heard on whether his convictions evidence professional misconduct and he was granted a factual hearing on matters in mitigation. There is certainly no basis in fact for his legal argument that he was denied the procedural elements of due process as to the charges of professional misconduct or as to the scope of the hearings in mitigation.

Although petitioner now objects to the Appellate Division's subsequent consideration of the nature of the charges against him in New York and Maryland and the factual support presented by the prosecuting attorneys at the time of petitioner's plea to reduced charges, it is apparent that these matters were integrally related to petitioner's assertions in mitigation. Petitioner, while asserting his innocence of all charges in Maryland on the ground of an alibi and while asserting his innocence of all charges in New York (with the possible exception of a charge for "bail-jumping" [See T1 97-99]) on various grounds, claimed that his plea of guilty in each instance was motivated by ill health, lack of funds, hostile judicial attitudes, and the like. It thereby became necessary for the Appellate Division to consider the totality of the circumstances of those pleas, including the nature of the underlying charges, the factual foundations offered by the prosecutors, and the prosecutor's reasons, stated on the record, for recommending the acceptance of a plea to a reduced charge. Such consideration, as reflected in the Appellate Division's opinion, clearly established that the plea was motivated, in part, by one factor in addition to those advanced by petitioner: the strong factual support for the prosecutor's case.

The charge of "bail-jumping" (N.Y. Penal Law §§215.56 and 215.57 (McKinney 1975)) is but one example of a matter

otherwise collateral to the charges of professional misconduct made relevant by petitioner's explanation of his motivation in entering a guilty plea in New York. On this subject, petitioner testified as follows (T1 97-99):

> Q. Now, you have disposed of your Baltimore case and tell us about the disposition of the case in New York City. Who was representing you in New York? A. In New York, Gerald Lefcourt represented me in New York.
>
> Q. And tell us about that. A. When we went back in March to finish up in New York, eight people in all that were arrested in that apartment that night, all the charges were dropped against everybody except me. I was the only one they had charges on. The district attorney stated very clearly that there was no evidence that I lived there; in fact, there was evidence to the contrary that I did not live there. I was just staying there for a while. However, they did add a charge against me for bail jumping when I was in Canada in Montreal. The New York case was continuing and I did not appear. Other persons, I understand, had been there had warrants against them, the cases were finally dismissed against everybody except me, and so I went back to New York in March. The district attorney informed me that they had added another charge to me of bail jumping.
>
> So I was in New York and I spoke with Gerald Lefcort about what we should do. There was no doubt in my mind that we could prove my innocence of the gun charges. There was no doubt in my mind. The only question was whether or not, what we could say about bail jumping was that defensible position because I was in Canada when I was supposed to appear in New York, and we had thought it would be advisable to avoid that issue since that issue might tend to include a moral turpitude issue, and it was resolved again with the district attorney that I took a plea under the Alford case, where I maintained my innocence and which was put in the record.

I took a plea to the weapons charge basically for the same reason that transpired in Maryland. I had had it. I just could not endure it any longer. Our lives, my wife's and mine, were totally chaotic. I was still living in tension and fear of threats and the entire episode in Maryland. I just could no longer endure it. I could no longer take it.

Q. Was bail jumping charge dismissed? A. Yes, the bail jumping charge and all the rest of the charges were dismissed.

Q. What was the disposition of the case in New York City? A. I took a plea to a misdemeanor, possession of weapons, and I received a conditional discharge of three years.

It is also apparent that petitioner introduced the subject of his "stay in Canada" in his verified answer (Answer, pp. 21-23) and in direct examination at the mitigation hearing (T1 55-60). Because this subject was introduced by petitioner as part of his own explanation for his activities, it was a proper subject for cross-examination and for consideration by the Appellate Division as relevant to mitigation.

Indeed, the cross-examination on this subject dramatically contrasted with the vague explanations of his activities in Montreal made in the answer and on direct examination. While petitioner asserted that he made a "difficult decision" and stayed in Canada after he learned in April, 1970 that he was wanted in Maryland (T1 55-58) and returned "voluntarily" after extradition proceedings had been begun (T1 59-60), the cross-examination added further damaging details. Petitioner went to Montreal to give a speech at McGill University, a speech which was cancelled after petitioner learned that he was being sought by authorities in Maryland (T2 316, 318). Petitioner's stay in Montreal was not motivated by any activity there (T2 324-325) other than his desire to avoid arrest and extradition (T2 330-347). Petitioner found a wallet containing an identification card for one "Leon Wright" (T2 326-331), which he used when apprehended by Montreal authorities during measures taken under emergency powers in October, 1970 after two diplomats were kidnapped (T2 334). Montreal authorities, however, discovered his identity and alerted Maryland. Only after extradition proceedings were actually begun did petitioner waive extradition and return to Maryland "voluntarily" with a police escort (T2 372).

The facts of this proceeding, therefore, are radically different from the situation in *In re Ruffalo*, 390 U.S. 544 (1968), where this Court held that an attorney subject to disciplinary proceedings was entitled to fair notice of the charge. In *Ruffalo* the sole charge of misconduct on which Ruffalo was disciplined was added out of his testimony in defense of other charges. The nature of that charge and the manner in which it had been introduced made it clear that Ruffalo did not have adequate notice or opportunity to present his defense. Here, petitioner was charged on two specific counts which the Appellate Division found to be sufficient. He was thereafter aware that the hearing in mitigation would encompass the matters of which he now complains because he introduced these subjects in his own pleading. Accordingly, while petitioner has correctly stated the abstract principle of *Ruffalo*, the principle has no application here.

POINT II

The questions sought to be raised by petitioner are not in fact presented on this record.

Petitioner's claim that he entered an "*Alford* plea" to the Maryland charges is patently untrue. The transcript shows that after the court ascertained that the petitioner was an attorney in New York and that he was making the plea voluntarily, with complete knowledge of the consequences, the defense counsel

stipulated to the prosecutor's description of the testimony and evidence that would be introduced at trial. In *mitigation* of sentence, counsel described the proof that the defense would present to counter the state's case, but the state objected to the defense counsel's declaration of the defendant's belief in his innocence. The assertion of innocence was stricken from the record (Complaint, Attachment F, pp. 41-42) after a conference at the bench during which the following transpired (*Id.*, pp. 40-41):

> THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina vs. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.
>
> MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.
>
> * * *
>
> THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.
>
> MRS. O'CONNOR: Correct. We would ask the entire portion starting "If Mr. Turco were called to the stand . . ." be deleted at this point and the plea continue with the completion of the last witnesses, Mr. Clerk.
>
> MR. KUNSTLER: I would agree to that.

It is clear that the court, the prosecutor and the defense counsel all understood that petitioner did not enter an "*Alford* plea."

Petitioner cannot claim surprise or entrapment from the use of his convictions in a subsequent disciplinary proceeding because their probable collateral consequences were made explicit to him at the time of entry of his pleas. For the reasons previously indicated (supra, p. 11), this is not a case of a criminal defendant unfairly caught by unforseeable consequences of a guilty plea.

POINT III

The questions presented by petitioner do not merit the attention of this court.

A. *The substantive issues involved in New York's attorney disciplinary procedures are outside the scope of this court's jurisdiction.*

This Court has consistently given the states wide latitude in their control over standards for the bar, except where important constitutional rights have been jeopardized. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 248-249 (1957) (Concurring Opinion). The federal courts have held fast to this important principle of federalism:

> ". . . Although a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights, e.g. *Spevack v. Klein*, 385 U.S. 511, 875 Ct. 625, 17 L.Ed. 2d 574 (1967), state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers." *Erdmann v. Stevens*, 458 F.2d 1205, 1210, (2d Cir. 1972), cert. den. 409 U.S. 889 (1972).

> "... The courts of the [states] have exclusive jurisdiction over the admission of attorneys, the regulation of the practice of law, and the discipline and disbarment of attorneys, so far as the practice of law in the state courts is concerned." *Ginger v. Circuit Court for the County of Wayne*, 372 F.2d 621, 625 (6th Cir. 1967), cert. den. 387 U.S. 935 (1967).

The substantive issues which the petition necessarily raises are properly within the discretion of the Appellate Division under New York's regulation of its bar, once it is clear that the elements of due process have been afforded petitioner. cf. *In re Ruffalo* 390 U.S. 544, 550 (1968) [disbarment from Court of Appeals for the Sixth Circuit]. Because the substantive standards of professional conduct committed to the discretionary power of the Appellate Division are beyond the jurisdiction of this Court, and because the present record is replete with substantive grounds which would independently justify the action of the Appellate Division, this case is not suitable for this Court's review.

B. ***The due process and equal protection arguments raised here have already been considered elsewhere.***

Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), considered the same equal protection argument presented here by petitioner and dismissed it as without merit on the basis that New York's procedure bears a rational connection to the vital state interest in maintaining the integrity of the bar. Petitioner presents no compelling reason why further federal review is necessary for this issue.

This Court considered the requirements for due process in attorney disciplinary proceedings in *In re Ruffalo*, 390 U.S. 544 (1968). In that case the Court examined the nature of the proceedings, their constitutional requirements, and laid down general guidelines for the states to follow. Petitioner presents no compelling reason for this Court to reassert those guidelines. His

particular case, at most, represents an application of *Ruffalo's* general guidelines in circumstances unlikely to recur.

C. ***The circumstances of this disciplinary action are unique.***

The circumstances which occurred in this action are unlikely to be repeated and do not represent those of a significant number of persons. In few disciplinary proceedings will an attorney stand convicted of criminal conduct related to activities with his clients. Presumably, in fewer still will an attorney, in mitigation, introduce the subject of a "Stay in Canada," where he used false identification to avoid pending criminal charges. The legal issues and facts confronted here are so unique as to make a ruling of general application improbable. Such a case is undeserving of this Court's attention.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: July 15, 1975

Respectfully submitted,

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APPENDIX

NEW YORK JUDICIARY LAW (McKINNEY 1969)

§ 90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

* * *

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

* * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or

removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

RULES OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

22 N.Y.C.R.R. §1022.9

(a) Disciplinary proceedings

(1) A verified complaint of professional misconduct against an attorney, stating facts in a form which will fairly permit answer, may be presented to the Appellate Division by a party aggrieved.

(2) Charges of professional misconduct may also be filed by a bar association or its appropriate committee, and may be either verified or accompanied by testimony, affidavits or other supporting proof.

(b) The court shall examine such complaint or charges and rule upon the sufficiency thereof prima facie. If the facts are found insufficient on their face, it shall so advise the complainant. If a complaint appears to warrant further action or inquiry but is not in an-

swerable form, the court shall transmit it to the appropriate bar association to be stated in proper form and/or verified. If the complaint or charges are sufficient prima facie to warrant action, the court may:

(1) direct that a copy be served by a day certain on the respondent with notice of the date fixed by the court prior to which the respondent must answer or make any desired motion addressed to such complaint or charges; or

(2) direct a complaint to be transmitted to a bar association for preliminary investigation and report.

(c) Any factual issue regarding a complaint or charges, raised by answer or otherwise, shall be determined in the first instance by the court or by a justice of the Supreme Court or a referee designated by the court. If no such issue is raised, or after completion of the hearing on such issue, the Appellate Division shall fix a time at which the respondent is to be heard in mitigation or otherwise, unless he waives in writing his privilege so to be heard.

(d) In addition to investigations ordered pursuant to subparagraph (b)(2), a bar association or appropriate committee may move ex parte for an order directing a preliminary investigation of charges of misconduct of an attorney or of unlawful practice of law, brought by or made to one of its officers, committees, counsel or members. In any such investigation testimony under oath may be taken. Membership in the bar association shall not result in disqualification to act therein. Subpoenas shall be issued in the name of the Presiding Justice by the clerk of the Appellate Division, at the request of either the bar association or committee or the respondent, for the attendance of witnesses and production of books and papers.

NEW YORK CIVIL PRACTICE LAW AND RULES, (MCKINNEY 1968)

§5601. Appeals to the court of appeals as of right.

(a) **Dissent, reversal or modification.** An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) **Constitutional grounds.** An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) **From an order granting new trial or hearing, upon stipulation for judgment absolute.** An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that,

upon affirmance, judgment absolute shall be entered against him.

(d) **Based upon non-final determination of appellate division.** An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

§ 5602. Appeals to the court of appeals by permission.

(a) **Permission of appellate division or court of appeals.** An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers

or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) **Permission of appellate division.** An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

§ 5612. Presumptions as to determinations of questions of fact.

(a) **Appeal from reversal or modification.** On an appeal from an order of the appellate division reversing, modifying or setting aside a determination and rendering a final or interlocutory determination, except when it reinstates a verdict, the court of appeals shall presume that questions of fact as to which no findings are made in the order or opinion of the appellate division were not considered by it, where such findings are required to be made by paragraph two of subdivision (b) of rule 5712.

(b) **Appeal on certified questions of law.** On an appeal on certified questions of law, the court of appeals shall presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the appellate division were determined in favor of the party who is respondent in the court of appeals.